

1989

Scott H. Phillips v. Kathryn A. Phillips : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Phillips v. Phillips*, No. 890304.00 (Utah Supreme Court, 1989).
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UTAH SUPREME COURT
BRIEF

IN THE UTAH SUPREME COURT

SCOTT H. PHILLIPS, :
Plaintiff/Respondent : Case No. 890304
vs. :
KATHRYN A. PHILLIPS : Priority No. 13
Defendant/Appellant :

RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

Appeal from the Utah Court of Appeals
(Case No. 870579-CA)

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IN THE UTAH SUPREME COURT

SCOTT H. PHILLIPS,	:	
Plaintiff/Respondent	:	Case No.
vs.	:	
KATHRYN A. PHILLIPS	:	Priority No. 13
Defendant/Appellant	:	

RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals correct in finding that certain property became marital property because it was purchased during the marriage regardless of the source of funds used to acquire the asset?

2. Did the trial court apportion property in a manifestly unjust or inequitable fashion so as to amount to a clear abuse of discretion?

OPINION OF THE COURT OF APPEALS

The Opinion of the Court of Appeals (hereinafter referred to as "the Opinion") appears under case number 870579-CA and was labeled "Not for Publication." The Opinion is set forth in the Appendix to this brief.

STATEMENT OF JURISDICTION

The Utah Court of Appeals entered its decision on March 31, 1989. It then entered an Order Denying Mr. Phillips' Petition for Rehearing on June 16, 1989. The Utah Supreme Court has jurisdiction over this case pursuant to §78-2-2(5), Utah Code Annotated (as amended 1988), pursuant to the rule making power conferred upon it by §78-2-4, Utah Code Annotated (as amended 1986), and through Rules of the Utah Supreme Court, Rule 43, subsections (2), (3) and (4).

CONTROLLING STATUTES

Section 30-3-5(1), Utah Code Annotated (as amended 1985), (Disposition of property - Maintenance and health care of parties and children - Court to have continuing jurisdiction)

30-3-5(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties...

STATEMENT OF THE CASE

1. Nature of the Case. This is a divorce proceeding; trial was held before the Honorable David E. Roth in the Second Judicial District Court of Weber County. The Decree of Divorce was entered on November 18, 1987 (See Appendix C). Mrs. Phillips appealed that decision to the Utah Court of Appeals, which (1) modified the property division and (2) remanded the case for further findings of fact concerning the alimony award. This Petition for Writ of Certiorari challenges only the property division.

2. Disposition at Trial Court. The trial court found that the assets of Phillips Investments, which totalled \$260,000, were the separate property of Mr. Phillips and not part of the marital estate (R. p.202, para.11). The court found that the marital estate had assets totalling \$140,876 (R. p.203, para.12) and awarded Mr. Phillips assets totalling \$70,052 and Mrs. Phillips assets totaling \$70,824. (Note - although Mr. Phillips received assets valued at \$94,052 and Mrs. Phillips received assets valued at \$46,824, this was equalized by Mr. Phillips paying to Mrs. Phillips the sum of \$24,000 (R. pp.206 & 207, para.11, 12 & 13)).

3. Disposition at Court of Appeals. The Court of Appeals found that the half of Phillips Investments that Scott Phillips received when his brother died was received as the result of a Buy-Sell Agreement between the two brothers. The Court said this turned half of Phillips Investments into property which was acquired as a result of a purchase during the marriage and was therefore marital, not separate property. It awarded Mrs. Phillips 50% of this half of Phillips Investments, for a total additional property award to her of \$70,000 (Opinion, pp.5&6).

5. Relevant Facts. In addition to the marital estate assets of \$140,876, there were also approximately \$260,000 worth of assets in Phillips Investments. The

Phillips Investments business entity was created by Mr. Phillip's parents through their operation of a funeral home business in Idaho from 1937 to 1979 (Tr. p.11). In 1966, it became known as White Mortuary, Inc., with Mr. Phillips and his parents being listed as initial incorporators (R. Exhibit #12). Mr. Phillips and his parents each received one share of stock in the corporation, but Mr. Phillips was not involved in the operation of the business (Tr. p.14).

In the 1970s, Mr. Phillip's parents began a yearly gift giving program in order to gradually transfer ownership of the business to their two sons with a minimum of estate tax consequences (Tr. pp.15, 39). In 1979, the parents sold the mortuary business to a Mr. Hamilton and Mr. Holman, and in 1982, the two sons purchased the balance of their parents' ownership in the business by signing a promissory note (Tr. p.17, 18). The payments on the promissory note to Mr. Phillip's parents were made out of the yearly payments received from Mr. Hamilton and Mr. Holman (Tr. p.18).

In 1983, the Phillips Investments entity was converted from a corporation to a partnership (Tr. p.20). In that same year, Mr. Phillips and his brother Mark signed a Buy-Sell Agreement indicating that if either died, the other would become sole owner of the assets (R. Exhibit #5). At the same time, the wives of Mr. Phillips and his brother

signed Joinder of Spouse documents (R. Exhibit #17 and see Appendix D to this brief), indicating they made no claim to the assets of Phillips Investments and recognizing it was the separate property of their husbands.

Phillips Investments then purchased life insurance policies on both brothers in order to fund the Buy-Sell Agreement. The premiums for the insurance policies were paid from yearly gifts of cash made to the brothers by their parents (See Appendix E). In 1984, Mr. Phillips' brother died and Mr. Phillips became the sole owner of the assets. In 1985, Mr. Phillips created the Phillips Investments Trust and placed into it all of the assets which had been part of the Phillips Investments business entity (Tr. p.7, lines 1-5).

Whatever the legal form of the Phillips' family business over the years, neither Mr. Phillips nor Mrs. Phillips were actively involved in the operation of the business. Mrs. Phillips was never involved in any part of the business or the management of assets (Tr. p.140, lines 10-19). Neither party ever added any of their own monies to the assets of Phillips Investments (Tr. p.65, lines 2-5; p.140, lines 20-23). Mr. Phillips' own involvement was very minimal and was limited to signing various documents his family advised him to sign (Tr. p.14, lines 9-11; p.16, lines 4-6; p.17, lines 22-25; p.24, lines 8-22; p.41, lines

21-25; p.42, line 1; p.64, lines 1-5). Mr. Phillips' parents testified that they still kept the books and records for Phillips Investments (Tr. p.23, lines 9 & 10; p.45, lines 7-9).

SUMMARY OF THE ARGUMENT

The Court of Appeals' decision, in ruling that because Scott Phillips acquired one-half of Phillips Investments through a Buy-Sell Agreement it was a purchase made during the marriage and therefore a marital asset, is a dramatic departure from precedents established by this Court. The Opinion ignores the fact that the Buy-Sell Agreement was funded by an insurance policy which was paid for with gifted funds. The Opinion established a new precedent in Utah that when separate property is used to purchase a new asset, that new asset is thereby transformed into marital property. (It is interesting to note that despite this significant new rule of law, the Court of Appeals designated the Phillips' Opinion as "Not for Publication.") Because the Court of Appeals' Opinion is in conflict with prior decisions of this Court, this Court should exercise its power of review. If the Court of Appeals is correct in its ruling that the type of transaction involved in Phillips transforms separate property to marital property, this is an important and new question of law which should be settled by this Court.

ARGUMENT

POINT ONE: THE COURT OF APPEALS MISAPPREHENDED THE FACTS WHEN IT STATED THAT MR. PHILLIPS PAID THE INSURANCE PREMIUMS ON HIS BROTHER'S LIFE INSURANCE POLICY.

The Court of Appeals refers several times in its Opinion to the "fact" that Mr. Phillips himself furnished the consideration to pay for the insurance policy on Mark Phillips' life. At the bottom of Page 3, the court states "...consideration for the insurance policy was paid by Mr. Phillips himself, not by a donor." At the top of Page 4 of the Opinion, the court states that "Mr. Phillips did not show it (the interest he acquired from his brother)...was acquired...with gifted or inherited funds." At the top of Page 5, the court states "(t)he fact that Mr. Phillips utilized insurance proceeds from a policy he purchased..." Again, at the bottom of Page 5, the court states that the share of Phillips Investments that Mr. Phillips received on the death of his brother "...was not purchased with funds that were gifted to him by a donor."

These statements by the Court of Appeals are absolutely incorrect. Nowhere in the trial of this action did Mr. Phillips or anyone else testify that he paid for the insurance premiums out of his own assets.

All references to payment of insurance premiums in the trial transcript show that Mr. Phillips' parents, Hugh and Frances Phillips, were making yearly gifts to their two

sons (Scott and Mark) to allow them to pay the premiums on the life insurance policies. A summary of those references from the trial transcripts is attached as Exhibit E in the Appendix to this brief.

If the Court of Appeals thought there was any confusion on the issue of whether or not Scott Phillips paid any of the insurance premiums from his marital property, it should have remanded the case to the trial court for further testimony. Mr. Phillips' parents could certainly produce evidence of each of the yearly checks that they gave to Scott and Mark as gifts in order to pay the insurance premiums, together with the checks that were then written by Mark to the insurance company to pay the premiums. There is not one reference in the trial transcript to Scott Phillips ever having personally made any payments of insurance premiums. While the parties' Buy-Sell Agreement, introduced as Exhibit 5 at the trial, does contain language that sounds as if Mr. Phillips was personally purchasing the insurance policies, this is not what in fact happened. This Court should look at the manner in which the parties actually conducted their business to determine whether or not an asset is separate or marital property. Because Mr. Phillips' marital property was in no way involved with the funding of this Buy-Sell Agreement, the proceeds of the funding should remain separate property.

It should also be noted that Mrs. Phillips makes much of the fact that the parties lived in a Jackson, Wyoming home from 1970 to 1979 which was owned by Phillips Investments. When Phillips Investments sold the house, it made a profit of approximately \$55,000 (Tr. p.48). Mrs. Phillips argues that this shows that part of Phillips Investments should have been a marital asset. However, in making this argument, she ignores the fact that the parties only had to pay rent of \$150 per month for a home which had a fair rental value of \$750 per month at the time they moved out (Tr. p.131, lines 23-25, p.132, lines 1-14). The fact that the parties were able to live for such a long period of time with a minimal rent payment most certainly allowed them to build their financial strength, such that they were able to acquire a marital estate worth some \$140,000. The fact that Phillips Investments made a profit from the sale of the home is not cause to bring the proceeds into the marital estate.

POINT TWO: BECAUSE ALL INSURANCE PREMIUMS WERE PAID WITH GIFTED FUNDS, THE PROCEEDS OF THE INVESTMENT REMAIN SEPARATE PROPERTY.

The Court of Appeals' Opinion states that Mr. Phillips acquired his brother's Phillips Investments stock during marriage by purchase and it is therefore marital property (p.5). The court also noted, in Footnote 4, that even if it believed Mr. Phillips had paid the insurance pre-

miums with gifted funds, he might have recovered the premiums, but the proceeds of the insurance policy would still be deemed marital property.

In ruling that because an asset was acquired during marriage by purchase, it becomes marital property, the court greatly deviated from the principles enunciated by this Court for determining whether an asset is separate property or marital property. In Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988), the Court stated that trial courts making equitable property distributions should

...generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, ... or (2) the property has been consumed or its identity lost through co-mingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. 760 P.2d at 308.

The Phillips' Opinion dismisses the fact that neither party contributed to the enhancement, maintenance or protection of the property. It also dismisses the fact that the property completely retained its separate identity and that it was not co-mingled with the Phillips' marital property. (The few assets obtained from Phillips Investment money, such as Mr. Phillips' car and part of the IRAs, were,

at the suggestion of Mr. Phillips, treated as marital property. See Tr. p.67, lines 2-6; Tr. p.68, lines 10-25, Tr. p.69, lines 1-11.) The court dismissed all of these factors as insignificant in view of the fact that Mr. Phillips "purchased" his brother's interest in Phillips Investments during marriage.

Since the Court of Appeals seems to be unconcerned with the source of funds used by Mr. Phillips to make this purchase, the logical extension of its ruling is that any party who sells separate property during marriage thereby loses the separate status of that asset. If stocks are sold to buy bonds, the bonds become marital property. If real estate is sold to buy gold coins, the coins become marital property. If an insurance policy is sold for its cash surrender value, and the money is used to purchase a certificate of deposit, the certificate of deposit becomes marital property. This method of analyzing separate property creates an exception so large that it swallows the principles set forth in Mortensen.

The Utah Supreme Court in Mortensen commented on the purpose for its ruling:

These rules will preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property. It also accords with the normal intent of donors or deceased persons that their gifts and inheritances should be kept within their family and succession should not be diverted because of divorce. 760 P.2d at 308 & 309.

Clearly, Mr. Phillips' parents, Hugh and Frances, who engaged in a painstakingly crafted gift giving program over a period of years (Tr. pp.39 & 40) and who gifted cash to their sons on a yearly basis in order to purchase the insurance policies used to secure the Buy-Sell Agreement, are exactly the type of persons to whom this Court referred when it discussed donors who intended to keep their gifts in the family.

The Court of Appeals cited Giedinghagen v. Giedinghagen, 712 S.W.2d 711 (Mo. Ct. App. 1986), In Re Marriage of Agazim, 498 N.E.2d 742 (Ill. App. 1986), and Wagner v. Wagner, 358 S.E.2d 407 (Va. Ct. App. 1987), as cases that support its conclusion that any property acquired during marriage by purchase or winnings is marital property. However, careful analysis of these cases show that they are not good authority for a court applying the Utah equitable distribution statute (§30-3-5, U.C.A.).

The court referred to Giedinghagen v. Giedinghagen, supra, as authority for a wife's lottery winnings being marital property. However, the Missouri court was interpreting a specific state statute as to whether property acquired after the filing of the divorce petition, but before the final divorce, was marital or separate property. The state statute, unlike Utah's, said that "all property acquired by either spouse is presumed to be marital property." (712

S.W.2d at 712). The court said that the wife's lottery winnings, won after the filing of the petition for dissolution, were marital property under the definition in the statute. However, the court then said

We do not hold nor intimate that husband here is entitled to any portion of the proceeds of the lottery winnings. The court is to make a just distribution of the marital property and in doing so may take into account the contribution of each spouse to the acquisition of the property as well as other considerations. (712 S.W.2d at 714, emphasis in the original).

A later case from that same court, citing Giedinghagen, noted the importance of looking at the "source of funds" rule for determining whether property is marital or separate. In Hill v. Hill, 747 S.W.2d 718 (Mo. Ct. App. 1988), the court stated that if separate property has been partly purchased through the use of marital funds, it would result in a percentage marital interest in a spouse's otherwise separate property. "Incremental property values are allocated proportionately to either marital or separate estates according to the source of funds used to purchase the property." 747 S.W.2d at 719

In the case of In re Marriage of Agazim, supra, the Illinois court was, again, interpreting a specific Illinois statute different from any in Utah. In that case, the court ruled that an interest a father gave to his daughter that included an obligation on the part of the daughter to pay

annual payments to the father was a purchase and not a gift for the purposes of property distribution. However, what the Utah Court of Appeals fails to note is that upon remand to the trial court for equitable distribution of assets the court awarded the entire interest to the wife because all of the payments made to her father were made with funds generated by the property, which neither spouse had to expend any effort to realize. In other words, the source of funds was considered. See In re Marriage of Agazim, 530 N.E.2d 110 (Ill. App. 1988).

The Court of Appeals also cited the case of Wagner v. Wagner, supra, as authority for the proposition that a transaction that was a purchase during marriage made the asset marital property. In Wagner, the court found that a daughter's signing of promissory notes to her father to acquire interest in a shopping center was a purchase, not a gift, even though the father later forgave repayment of the promissory notes as a program of gift giving to his children. The court said that because it was a purchase, it was marital property.

This is different than the result reached in Wierman v. Wierman, 387 N.W.2d 744 (Wisc. 1986). (Wierman is a case cited by the Utah Supreme Court in its Mortensen decision as it reviewed case law from other states and, from that review, enunciated the principle to be followed in

Utah. See 760 P.2d at 307.) In Wierman, the father had transferred his interest in a real estate venture to his daughter. The transfers were made over a period of years and were structured as part gift and part purchase, with the purchase price payable in installments. The father each year forgave the repayment of the daughter's promissory notes as a gift. The Wierman court, in direct contradiction to the Wagner court, found that the wife's interest in this real estate venture, acquired by her through a gift from her father, retained its character as separate property, despite the fact that purchase documents had been signed. The court also noted that despite a sale and exchange of assets, the increase in the value of the separate property was not attributable to either spouse, but was the result of a source independent of the marriage. Therefore, the asset should remain separate property. The logic followed by the Wisconsin court in Wierman is much more in line with the Utah principles explained in Mortensen for evaluating separate and marital property than the logic followed by the Virginia court in Wagner.

It is instructive to review three other cases that were cited in the Mortensen decision by this Court (760 P.2d at 307) as it reviewed case law from other states as supportive of the principles it established for evaluating separate property. In the case of In re Marriage of Pitluck,

616 S.W.2d 861 (Mo. Ct. App. 1981), the court found that the cash value of life insurance policies attributable to premiums paid by the husband's father could be treated as gifts from the father to son and were therefore the son's separate property. The court acknowledged that a percentage of the value attributable to premiums paid by the son from marital funds could be considered marital property; however, there was insufficient evidence in this case on what that amount would be. Similarly, in *Phillips*, the value of the life insurance policy, which in this case had a death benefit value rather than a cash surrender value, should be Mr. Phillips' separate property. See also Bailey v. Bailey, 295 S.E.2d 304 (Ga. 1982), (husband's mother had used proceeds of a life insurance policy on the husband's father to buy a home and gave the home to the husband; the court held the home was separate property); and Van Newkirk v. Van Newkirk, 325 N.W.2d 832 (Neb. 1982), (the increase in the value of an asset, when that increase was not due to the efforts of either marital partner, should remain separate property).

In Mortensen, this Court discussed three circumstances where there would be an exception to the rule that property acquired by gift should remain the separate property of the donee spouse. On p.307, the Court lists the following three exceptions:

1. When the property thus acquired is consumed, such as when a gift or inheritance of money is used for family purposes.

2. When the property completely loses its identity and is not traceable because it is co-mingled with other property.

3. When the acquiring spouse places title in joint names in such a manner as to evidence an intent to make it marital property.

Clearly, none of these circumstances were present in Mr. Phillips' treatment of the assets of Phillips Investments. The trial court was correct when it examined the contributions that had been made by Mr. and Mrs. Phillips to the assets of Phillips Investments, and upon determining that neither party had made any contributions to the assets, that it should remain the separate property of Mr. Phillips.

POINT THREE: THE COURT OF APPEALS ACTED IN DIRECT CONTRADICTION TO RULINGS OF THIS COURT IN REVERSING A PROPERTY DISTRIBUTION THAT WAS NOT UNJUST NOR INEQUITABLE.

The Court of Appeals is not permitted to reverse a trial court's property distribution unless the apportionment "works such a manifest injustice or inequity as to indicate a clear abuse of discretion." Petersen v. Petersen, 737 P.2d 237 (Utah App. 1987). This Court in the Mortensen decision reemphasized this fact:

Significantly no case has been found where this court has reversed a trial court's disposition of gifts or inherited property received by one party during the marriage. In almost every case we have emphasized the wide discretion trial courts have in property division. 760 P.2d at 307.

The trial court in this case was within its discretion in finding that the assets of Phillips Investments were the separate property of Scott Phillips. In fact, the trial court considered Mr. Phillips' income from the assets when determining the appropriate amount of child support and alimony. The fact that the Court of Appeals does not agree with the manner in which the trial court exercised its discretion does not give it the right to reverse that decision.

This Court has also noted that sometimes the only equitable distribution of property involves awarding some of the gifted or inherited separate property to the non-donee spouse. This Court has stated that, "the overarching general rule remains the same in any divorce case: to provide adequate support for the children of the marriage." Race v. Race, 740 P.2d 253 at 256 (Utah 1987), and, "to divide the economic assets and income stream of the parties so as to permit both to maintain themselves after the marriage as nearly as possible at the standard of living enjoyed during the marriage." Noble v. Noble, 761 P.2d 1369 at 1373 (Utah 1988). In the case at hand, very little of the money from Phillips Investments was used to maintain a certain standard of living. Those assets which were purchased from Phillips Investments' money and used by the parties were clearly labeled marital assets and divided as part of the marital estate.

CONCLUSION


The Court of Appeals, in labeling one-half of Phillips Investments marital property simply because it was acquired by "purchase" during the marriage, has issued a decision which conflicts with the principles set forth by this Court in Mortensen and its predecessors. The lower court has failed to look at the source of funds used to acquire the asset, and has ignored the fact that neither spouse contributed any effort or money to the value of the asset. Pursuant to Rule 43(2) of the Rules of the Utah Supreme Court, this Court should grant review by writ of certiorari.

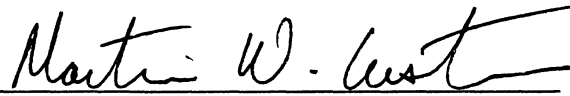
Furthermore, if there is to be a new rule in Utah which states that assets acquired by purchase during marriage are to be labeled marital assets, it is a rule which should be explained and set forth by this Court. It would cause a major change in the way attorneys and clients would evaluate assets, both in terms of divorces and in terms of estate, gift and tax planning. Most likely, after full review, this Court would conclude that such a dramatic change in the law would have to come from the legislature, not the courts. It certainly is not a change in the law that should come from an unpublished opinion of a panel of the Court of Appeals. Pursuant to Rule 43(4) of the Rules of the Utah Supreme Court, this Court should grant

certiorari.

RESPECTFULLY submitted this 14th day of July, 1989.

MARQUARDT, HASENYAGER & CUSTEN


JANE A. MARQUARDT
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CERTIFICATE OF MAILING

* * * * *

I hereby certify that on this 14th day of July, 1989, I mailed four true and correct copies of the above and foregoing Petition for Writ of Certiorari, postage prepaid, to Robert L. Neeley, Attorney for Appellant, 2485 Grant Avenue #200, Ogden, Utah 84401.


JANE A. MARQUARDT
Attorney for Respondent

FILED

MAR 31 1989

John T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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RECEIVED APR 03 1989

Scott H. Phillips,)
)
Plaintiff and Respondent,)
)
v.)
)
Kathryn A. Phillips,)
)
Defendant and Appellant.)

OPINION
(Not For Publication)

Case No. 870579-CA

Second District, Weber County
The Honorable David E. Roth

Attorneys: Robert L. Neeley, Ogden, for Appellant
Jane A. Marquardt, Ogden, for Respondent

Before Judges Davidson, Bench, and Jackson.

JACKSON, Judge:

Appellant, Kathryn Phillips, seeks reversal or adjustment of the property and alimony awarded to her upon divorce. We reverse the judgment of the trial court and remand the case for further consideration.

The precise property issue we must decide is whether property acquired during marriage through a buy-sell agreement of one spouse is the separate property of that spouse or marital property?

The alimony issue is whether the findings support the alimony award as to amount and time limit.

PROPERTY: SEPARATE OR MARITAL?

The parties were married October 6, 1967. At the time of divorce, each was forty-five years of age and their two sons were nineteen and sixteen. Mrs. Phillips had one year of college and one and one-half years of medical technology training prior to marriage. She was a homemaker during the

twenty-year marriage and was unemployed when divorced. Mr. Phillips was a career employee with the U.S. Forest Service.

In January 1967, Scott Phillips' parents organized a business corporation which became known as Phillips Investment Corporation, Inc. During the 1970's, his parents gifted to him and his brother, Mark, 24.5% each of the corporate stock. On January 1, 1980, the brothers entered into a "Buy-Sell Stock Agreement." Therein each agreed to purchase the stock of the other in the event of death or a lifetime sale. The purchase price was to be determined on an annual basis by endorsing a stock value on a schedule. Each agreed to procure, as policy owner and beneficiary, life insurance on the life of the other in the amount specified in the schedule. Each was required to maintain the policy owned, "paying all premiums when due and delivering proof of such premium payment to the insured." If the premium was not paid, the other could advance payment and would be entitled to reimbursement with interest. Their agreement provided that upon death of a stockholder, "the surviving stockholder shall purchase all of the decedent's stock in the corporation." In the event the value of the stock exceeded the insurance proceeds, the balance of the purchase price could be paid by delivering a negotiable promissory note in that amount payable on terms specified. If life insurance coverage exceeded the stock value, "the excess of each policy shall be retained by the beneficiary thereof for his own benefit."

In 1982, the brothers acquired the balance of the corporate stock from their parents and became equal owners. In 1983, the brothers converted the corporation into Phillips Investments, a general partnership. At that time, they requested each of their wives to sign a document labeled "Joinder of Spouse," and each wife obliged on May 12, 1983. That document stated that "the stock of [the corporation] was acquired by her husband prior to their marriage or by gift during marriage" and is his sole and separate property and that "all income and gains from such separate property shall be the sole and separate property of said husband." (Emphasis added.)

In 1984, Mark Phillips died, and Scott Phillips purchased his brother's 50% share of Phillips Investments for \$218,000 funded by insurance proceeds. Thereafter, Mr. Phillips transferred the assets into Phillips Investment Trust. At time of trial, the trust was valued at \$260,000. The lower court entered the following finding of fact:

Plaintiff is the owner of assets worth approximately \$260,000.00 which are now in the entity known as Phillips Investment Trust. These assets were gifted to plaintiff by his parents over a period of many years. Neither plaintiff nor defendant have done any significant work in the business which made up Phillips Investments, nor have either of them made any contributions to the value of the assets in Phillips Investments. The assets of Phillips Investments are Plaintiffs' separate property and defendant has no claim to this property. The fact that plaintiff does have the resources of Phillips Investments available to him is relevant only to his ability to pay child support and alimony.

The conclusions of law state: "The assets of Phillips Investment Trust are plaintiff's sole and separate property and defendant has no claim thereto." Mrs. Phillips contends that the one-half ownership of the partnership-trust acquired from Mark Phillips was not "by means of inheritance or gift but as the result of a business transaction." Thus, she argues, this particular 50% ownership share is marital property, not Mr. Phillips' separate property. Mr. Phillips argues in support of the above findings. He also argues that, in any event, the language of the "Joinder of Spouse" document should be dispositive of any claim that this last-acquired 50% share is marital property. We do not agree with Mr. Phillips.

Our initial consideration is whether the stock was acquired during marriage. Virtually all of the stock was acquired during the twenty-year marriage. The business corporation was organized the same year the parties were married. The lower court found that 100% of the assets (stock) was gifted to Mr. Phillips by his parents. That finding is clearly in error. The parties agree that 50% was acquired from Mark Phillips, not from the brothers' parents. Further, Mark's 50% was not acquired by gift; consideration for the insurance policy was paid by Mr. Phillips himself, not by a donor. In any event, Mr. Phillips acquired his brother's 50% during the marriage. Thus, it was not premarital property.

Insofar as the stock purchased from his brother is concerned, Mr. Phillips did not show it was owned by him prior to marriage, or that he acquired it by gift or inheritance during the marriage or with gifted or inherited funds. See Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). Only his first 50% interest was obtained from his parents by gift. As to the gifting of that portion, the finding of the lower court is affirmed. The joinder document signed by Mrs. Phillips relates only to that stock acquired by him before marriage or by gift during marriage. The legality of the document is not at issue and we need not consider its validity. Moreover, it only relates to the separately owned stock acquired up to that time or to income from that stock (interest or dividends) or gain from that stock (appreciation in value). The remainder of the stock acquired from his brother by virtue of their buy-sell agreement was neither income nor gain from his prior holdings. This is not a case like Preston,¹ which involved appreciation in value of a premarital asset of the husband and property inherited by the wife, nor is it like Burke,² which involved appreciation in value of the wife's inherited property.³

On the other hand, this is a case like Wagner v. Wagner, 4 Va. App. 397, 358 S.E.2d 407, 409-11 (1987). There, a father gave each of his children an option to acquire an interest in a shopping center. Each of the children exercised the option and delivered promissory notes to their father in payment of the purchase price. Later, the father forgave payment of the notes as gifts to his children. Thereafter, one of his married daughters became involved in a divorce action. She contended the entire transaction was a gift and that her shopping center ownership was her separate property. The husband contended that, when she acquired the interest, she did so with a loan from her father. Thus, he argued that the transaction was a purchase, not a gift, and that the forgiving of the note was irrelevant. The court agreed that the transaction was a

1. Preston v. Preston, 646 P.2d 705 (Utah 1982).

2. Burke v. Burke, 733 P.2d 133 (Utah 1987).

3. The trial court and the parties mistakenly characterized the property issue as appreciation in value after inheritance or gift. Their concern was whether either party had done work or made contributions adding value to the stock gifted by Mr. Phillips' parents.

purchase on the date it occurred and the character thereof could not be altered by later action.

Here, the Phillips brothers' stock transaction was pursuant to an arm's-length buy-sell agreement. The fact that Mr. Phillips utilized insurance proceeds from a policy he purchased to fund the full purchase price of his brother's stock did not change the transaction to one of gift or inheritance. Nor would the character of the transaction be other than purchase if funded part by insurance proceeds and part by notes, as their buy-sell agreement contemplated, or if funded by borrowing from a third party, or by some other fortuitous event, such as a lottery. The stock was acquired during marriage by purchase and is marital property. See In re Marriage of Agazim, 147 Ill. App. 3d 646, 498 N.E.2d 742 (1986) (transfer of apartment building to wife from wife's father was sale rather than nonmarital gift, agreement transferring buildings was contract of sale); Giedinghagen v. Giedinghagen, 712 S.W.2d 711 (Mo. Ct. App. 1986) (wife's lottery winnings were marital property, subject to equitable distribution).

In summary, Mr. Phillips did not acquire his brother's stock prior to marriage. It was not separate as premarital property. His brother's share was not received by Mr. Phillips from anyone as an heir or devisee. Thus, it was not separate as inherited property. The share was not received by Mr. Phillips from a donor as donee and was not purchased with funds that were gifted to him by a donor. Thus, it was not separate as gifted property. Mr. Phillips was a buyer who purchased the stock from a seller pursuant to a written contract of sale. Thus, the stock is marital property because acquired by purchase during marriage. The funding arrangement did not alter the nature of the property acquired.⁴

The parties requested, as being equitable, an equal

4. In his brief, Mr. Phillips argues that "the evidence shows that plaintiff had received these assets through gifts and inheritance from his family." He did not argue that the insurance proceeds were his separate property on any rationale. If he had shown that the insurance premiums were paid with advances of his separate property, he might have recovered the amount thus paid, but not the proceeds of the insurance policy. See, e.g., Preston v. Preston, 646 P.2d 705 (Utah 1982) (husband credited with \$9,310.93 advanced on cabin); Humphreys v. Humphreys, 520 P.2d 193 (Utah 1974) (wife reimbursed \$3,400 advanced as down payment on family home).

distribution of their marital property. The lower court honored their requests concerning the property distributed. Thus, Mrs. Phillips is entitled to one-fourth of the Phillips Investment Trust (one-half of 50%) as valued on the date of divorce, together with a pro rata share of income/loss and appreciation/depreciation accrued thereon.

We reverse and remand for a property award consistent with this opinion.

ALIMONY AWARD

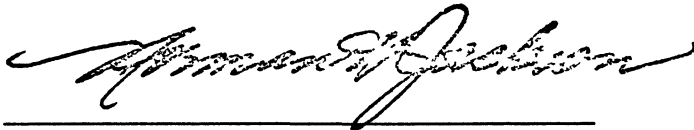
Finally, we turn to the alimony award of \$1,000 per month for ten years. Mrs. Phillips' principal assertion concerning alimony is that the trial court failed to make findings on two of the three alimony factors stated in Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). We agree with this contention. The trial court found that Mr. Phillips had ability to provide support from his income of \$5,000 per month. There is no finding concerning Mrs. Phillips' needs. Her exhibit showed monthly living expenses of \$1,000. He did not challenge that amount. He claims she only asked for \$1,000 alimony, but her request was made in tandem with a request for \$156,584 in property distribution. She received only \$71,000 in property. The court did make the following finding relating to the factor of her ability to support herself:

Defendant has received post high school training and earned a certificate in medical technology. Defendant has not used this certificate in many years and has been employed only in a few minor jobs; during most of defendant's marriage to plaintiff, she has been a full time homemaker and not employed outside the home. Defendant has basically good health, is intelligent, and is capable of employment. Defendant has no current source of income and is entitled to an award of alimony.

There is no finding concerning her earning capacity, which would provide a baseline for modification purposes. See Higley v. Higley, 676 P.2d 379, 382 & n.1 (Utah 1983); Canning v. Canning, 744 P.2d 325, 326-27 (Utah Ct. App. 1987). We are unable to review the adequacy of the findings to support the

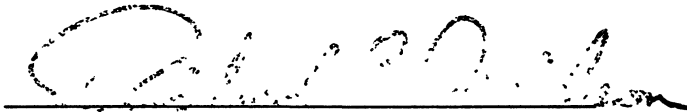
conclusion that "plaintiff should pay to decedent the sum of \$1,000.00 per month," nor do we see any evidence or finding supporting or relevant to the conclusion that alimony should continue for a period of only ten years and not be permanent. Nothing in the record indicates any particular significance of that period of time.

Accordingly, we reverse and remand for additional findings concerning: (1) Mrs. Phillips' needs;⁵ (2) her ability to provide for herself, including an earning capacity baseline; (3) elimination of the ten-year cap on alimony; (4) a separate finding concerning income which will flow to both parties from the assets awarded them; and (5) an alimony award consistent with those findings. See Johnson v. Johnson, 103 Utah Adv. Rep. 22 (Ct. App. March 8, 1989).



Norman H. Jackson, Judge

WE CONCUR:



Richard C. Davidson, Judge



Russell W. Bench, Judge

5. Mrs. Phillips testified that she needed, in addition to her monthly living expenses, income for employment training and rehabilitation so she could provide for herself. Apparently, she expected to provide for her rehabilitation through income from a larger property award, which she did not receive.

CERTIFICATE OF MAILING

I hereby certify that on 31, March 1989 I mailed a true and correct copy of the foregoing OPINION by depositing the same with the United States Mail, postage prepaid to the following:

Robert L. Neeley
Campbell & Neeley
Attorney for Appellant
2485 Grant Avenue, Suite 200
Ogden, UT 84401

Jane A. Marquardt
Marquardt, Hasenyager & Custen
2661 Washington Blvd., #202
Ogden, UT 84401

Honorable David E. Roth
Weber County Court
Second District Court
2549 Washington Blvd.
Ogden, UT 84401

DATED this 31st day of March, 1989.

By Kathleen Flynn
Kathleen Flynn
Case Management Clerk

RECEIVED JUN 20 1989

IN THE UTAH COURT OF APPEALS

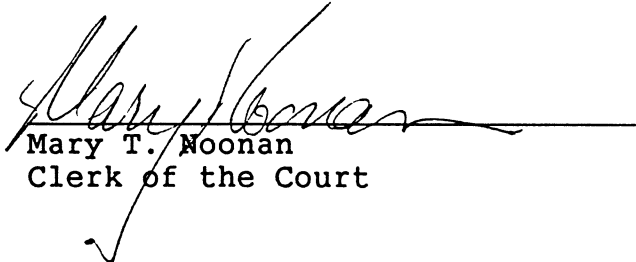
Scott H. Phillips,	:	
	:	
Plaintiff and Respondent,	:	ORDER DENYING PETITION
	:	FOR REHEARING
v.	:	
	:	CASE NO. 870579-CA
Kathryn A. Phillips,	:	
	:	
Defendant and Appellant.	:	

THIS MATTER having come before the Court upon Plaintiff/
Respondent's Petition for Rehearing in the above captioned matter,
and the Court having duly considered said petition.

IT IS HEREBY ORDERED that the Plaintiff/Respondent's
Petition for Rehearing be denied.

Dated this 16th day of June, 1989.

FOR THE COURT


Mary T. Noonan
Clerk of the Court

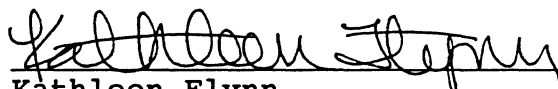
CERTIFICATE OF MAILING

I hereby certify that on 19, June 1989 I mailed a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING by depositing the same with the United States Mail, postage prepaid to the following:

Robert L. Neeley
Campbell & Neeley
Attorney for Appellant
2485 Grant Avenue, Suite 200
Ogden, UT 84401

Jane A. Marquardt
Marquardt, Hasenyager & Custen
2661 Washington Blvd., #202
Ogden, UT 84401

DATED this 19th day of June, 1989.

By 
Kathleen Flynn
Deputy Clerk

JANE A. MARQUARDT
MARQUARDT, HASENYAGER & CUSTEN
Attorneys for Plaintiff
2661 Washington Boulevard, Suite 202
Ogden, Utah 84401
Telephone: (801) 621-3662
Utah State Bar No. 2085

1

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

SCOTT H. PHILLIPS,	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
vs.	:	
KATHRYN A. PHILLIPS,	:	Civil No. 98183
Defendant.	:	

2

The above entitled matter came on regularly for trial on October 23, 1987 before the Honorable David E. Roth, judge of the above entitled court. Plaintiff was both personally present and represented by his attorney Jane A. Marquardt. Defendant was present and represented by her attorney Robert L. Neeley. Upon hearing sworn testimony from the parties and witnesses, and after receiving into evidence various written exhibits, and hearing arguments of counsel, and being fully advised in the matter, the court enters the following:

FINDINGS OF FACT

1. Plaintiff and defendant maintained a matrimo-

nial domicile in Weber County, State of Utah, and defendant was a resident of Weber County for more than three months immediately preceding the filing of this divorce complaint.

2. Plaintiff and defendant are husband and wife, having been married on October 6, 1967 in Alta, Utah. Both plaintiff and defendant are presently 45 years of age.

3. Two children have been born as issue of this marriage, one of whom is still a minor, to wit: Christopher John Phillips, born November 11, 1970.

4. During the marriage, the parties have experienced various problems and they have now been separated for approximately one year and both parties are entitled to be granted a decree of divorce on the basis of irreconcilable differences.

5. Plaintiff and defendant agree that defendant should be awarded custody of the minor child, subject to plaintiff's reasonable rights of visitation.

6. Plaintiff is a full time employee of the United States Forest Service and has received a gross monthly salary of \$3,155.00. He also has the right to receive income from Phillips Investment Trust. Over the past five years, the amount of income available to plaintiff from Phillips

Investments has averaged \$25,000.00 per year and the court finds that plaintiff will continue to receive approximately this amount of money from Phillips Investments. The court finds that plaintiff's income will continue at close to this rate despite the fact that the major income of Phillips Investments, payments from the Hamilton/Holman promissory note, will cease after 1990. The court believes that the assets of the trust are worth approximately \$260,000.00 and will continue to generate at least \$21,000.00 per year in income to plaintiff.

7. The court believes it is reasonable to set plaintiff's child support and alimony responsibilities on an expected total monthly gross income of \$5,000.00. This figure includes \$3,155.00 per month from plaintiff's employment with the forest service and \$1,750.00-\$2,083.00 per month from Phillips Investments.

8. Defendant has received post high school training and earned a certificate in medical technology. Defendant has not used this certificate in many years and has been employed only in a few minor jobs; during most of defendant's marriage to plaintiff, she has been a full time homemaker and not employed outside the home. Defendant has

basically good health, is intelligent, and is capable of employment. Defendant has no current source of income and is entitled to an award of alimony.

9. Defendant is entitled to alimony in the amount of \$1,000.00 per month, beginning November 1, 1987 and continuing for a period of ten (10) years, or until the death of plaintiff or defendant, or the remarriage of defendant, or upon defendant's cohabitation with another man, whichever event occurs first.

10. Defendant is entitled to child support in the amount of \$622.00 per month, the same to be paid until the child, Christopher, graduates from high school, assuming he graduates on schedule with his class.

11. Plaintiff is the owner of assets worth approximately \$260,000.00 which are now in the entity known as the Phillips Investments Trust. These assets were gifted to plaintiff by his parents over a period of many years. Neither plaintiff nor defendant have done any significant work in the business which made up Phillips Investments, nor have either of them made any contributions to the value of the assets in Phillips Investments. The assets of Phillips Investments are plaintiff's separate property and defendant

has no claim to this property. The fact that plaintiff does have the resources of Phillips Investments available to him is relevant only to his ability to pay child support and alimony.

12. The parties have accumulated various assets in the marriage, valued as follows:

a. Equity in Riverdale, Utah home	\$ 29,000.00
b. Hoback, Wyoming property	45,000.00
c. Victor Estates	4,500.00
d. Plaintiff's retirement	29,000.00
e. Plaintiff and defendant IRAs	14,528.00
f. Weber Valley Bank savings	1,600.00
g. Moore Financial stock	648.00
h. Ketchum bank account	300.00
i. 1986 Volkswagon automobile	6,800.00
j. 1981 Honda automobile	2,000.00
k. Furniture and household contents in defendant's possession	6,500.00
l. Furniture, sporting equipment and personal effects in plaintiff's poss.	1,000.00

13. The parties have incurred various debts, including a mortgage on the Riverdale home owing to Fleet Mortgage in the approximate amount of \$47,000.00, a bill owing to Sears in the amount of \$335.00, and \$600.00 owing to Rose Bourgeois for money loaned on the Hoback property.

14. Plaintiff is employed by the United States Forest Service and has health insurance coverage through his employer. Pursuant to the terms of the federal law known as C.O.B.R.A., defendant is eligible to enroll for continued

insurance coverage as the ex-spouse of a covered employee.

14. Each party has retained an attorney to represent them in this action and has agreed to pay a reasonable amount for attorney fees.

From the above and foregoing Findings of Fact, the court arrives at the following:

CONCLUSIONS OF LAW

1. That both parties should be awarded a Decree of Divorce from the other party herein, the same to become final upon signing by the judge and filing with the clerk of the Second Judicial District Court of Weber County, State of Utah.

2. That the sole care, custody and control of the parties' minor child, to-wit: Christopher John Phillips be awarded to defendant, subject to reasonable rights of visitation in the plaintiff.

3. That the plaintiff should pay to the defendant, as and for child support, the sum of \$622.00 per month, and shall make such payments until said child attains majority or the child's regular high school class graduates, whichever occurs later.

4. That alimony should be awarded upon the follow-

ing terms: plaintiff should pay to defendant the sum of \$1,000.00 per month, beginning November 1, 1987 and continuing for a period of ten (10) years, or until the death of plaintiff or defendant, or the remarriage of defendant, or upon defendant's cohabitation with another man, whichever event occurs first.

5. One-half of plaintiff's monthly child support and alimony payment, or \$811.00, shall be paid directly to defendant by the 1st day of each month and one-half shall be paid directly to defendant by the 15th day of each month.

6. That the child support Order should include, as a means of collecting child support, a provision for withholding income pursuant to Sections 78-45d-1 et seq., Utah Code Annotated.

7. Plaintiff and defendant shall alternate claiming the minor child as a dependent on their tax returns with plaintiff being entitled to claim him in 1987, defendant in 1988, and so on. Plaintiff must be current on his child support payments to claim the child as a dependent on his tax return. Defendant is required to sign the necessary forms with the Internal Revenue Service which indicate that plaintiff is entitled to claim the child as a deduction

in the appropriate years.

8. Plaintiff shall assist defendant in enrolling for continued health insurance coverage through the C.O.B.R.A. regulations and defendant shall be responsible for paying the premiums for this coverage.

9. Plaintiff should continue carrying medical and dental insurance on the minor child, providing it remains available through his place of employment. Any medical or dental bills of the child which are not covered by insurance should be split between the parties, with each party having the responsibility of paying one-half of any uncovered medical or dental costs.

10. That each party is awarded his or her own personal property already in their possession.

11. Plaintiff should be awarded the following items of property:

a. His federal retirement, free of any claim of the defendant	\$ 29,000.00
b. Furniture, sporting equipment and personal effects in plaintiff's poss.	1,000.00
c. 1986 Volkswagon automobile	6,800.00
d. Ketchum bank account	300.00
e. Hoback property	45,000.00
f. Plaintiff's IRA	11,952.00

TOTAL	<u>\$ 94,052.00</u>
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12. Defendant is awarded the following items of property:

a. Riverdale home located at 3985 South 700 West, subject to mortgage thereon	\$ 29,000.00
b. Furniture and household contents in defendant's possession	6,500.00
c. 1981 Honda automobile	2,000.00
d. Defendant's IRA	2,576.00
e. Weber Valley Bank savings	1,600.00
f. Moore Financial stock	648.00
g. Victor Estates	4,500.00

TOTAL	<u>\$ 46,824.00</u>
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13. In order to equalize the above property distribution, plaintiff shall pay to defendant:

(a) the sum of \$12,000.00 cash, the same to be paid within ninety (90) days, or on or before January 21, 1988.

(b) Pursuant to the stipulation of the parties, plaintiff shall pay to defendant an additional sum of \$12,000.00 in order to compensate her for plaintiff's IRA. This sum shall be paid within two (2) weeks of the entry of this Decree of Divorce.

14. The assets of Phillips Investments Trust are plaintiff's sole and separate property and defendant has no claim thereon.

15. Defendant is entitled to all antiques which were given to her by her family, free and clear of any claim by plaintiff.

16. Defendant shall pay the mortgage on the Riverdale home to Fleet Mortgage and hold plaintiff harmless thereon, together with any other debts or obligations she may have in her own name.

17. Plaintiff shall pay the Sears bill in the approximate amount of \$335.00, the debt owing to Rose Bourgeois in the amount of \$600.00, together with any other debts or obligations he may have in his own name and hold defendant harmless thereon.

18. Plaintiff shall pay to defendant's attorney, Robert L. Neeley, the sum of \$1,000.00 as partial payment of defendant's attorney fees.

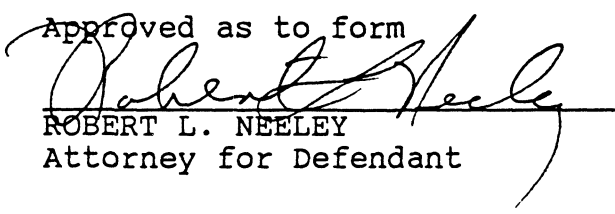
20. Let Judgment and Decree be entered in accordance herewith.

DATED this 18 day of November, 1987.

BY THE COURT:


DAVID E. ROTH
District Court Judge

Approved as to form


ROBERT L. NEELEY
Attorney for Defendant

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Nov 19

JANE A. MARQUARDT
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Attorneys for Plaintiff
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Ogden, Utah 84401
Telephone: (801) 621-3662
Utah State Bar No. 2085

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

SCOTT H. PHILLIPS,	:	DECREE OF DIVORCE
Plaintiff,	:	
vs.	:	
KATHRYN A. PHILLIPS,	:	Civil No. 98183
Defendant.	:	

70/308-312

The above entitled matter came on regularly for trial on October 23, 1987 before the Honorable David E. Roth, judge of the above entitled court. Plaintiff was both personally present and represented by his attorney Jane A. Marquardt. Defendant was present and represented by her attorney Robert L. Neeley. Upon hearing sworn testimony from the parties and witnesses, after receiving into evidence various written exhibits, hearing arguments of counsel, being fully advised in the matter, and having already made and entered, separately and in writing, its Findings of Fact and Conclusions of Law, and having therein directed entry of Judgment and Decree in accordance

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therewith.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That both parties are awarded a Decree of Divorce from the other party herein, the same to become final upon signing by the judge and filing with the clerk of the Second Judicial District Court of Weber County, State of Utah.

2. That the sole care, custody and control of the parties' minor child, to-wit: Christopher John Phillips, be awarded to defendant, subject to reasonable rights of visitation in the plaintiff.

3. That the plaintiff shall pay to the defendant, as and for child support, the sum of \$622.00 per month, and shall make such payments until said child attains majority or the child's regular high school class graduates, whichever occurs later.

4. That alimony is awarded upon the following terms: plaintiff shall pay to defendant the sum of \$1,000.00 per month, beginning November 1, 1987 and continuing for a period of ten (10) years, or until the death of plaintiff or defendant, or the remarriage of defendant, or

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Civil No. 98183
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upon defendant's cohabitation with another man, whichever event occurs first.

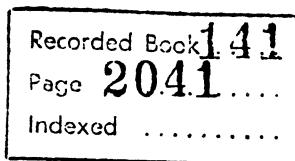
5. One half of plaintiff's monthly child support and alimony payment, or \$811.00, shall be paid directly to defendant by the 1st day of each month and one-half shall be paid directly to defendant by the 15th day of each month.

6. That the child support Order shall include, as a means of collecting child support, a provision for withholding income pursuant to Sections 78-45d-1 et seq., Utah Code Annotated.

7. Plaintiff and defendant shall alternate claiming the minor child as a dependent on their tax returns with plaintiff being entitled to claim him in 1987, defendant in 1988, and so on. Plaintiff must be current on his child support payments to claim the child as a dependent on his tax return. Defendant is required to sign the necessary forms with the Internal Revenue Service which indicate that plaintiff is entitled to claim the child as a deduction in the appropriate years.

8. Plaintiff shall assist defendant in enrolling for continued health insurance coverage through the C.O.B.R.A. regulations and defendant shall be responsible

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for paying the premiums for this coverage.

9. Plaintiff shall continue carrying medical and dental insurance on the minor child, providing it remains available through his place of employment. Any medical or dental bills of the child which are not covered by insurance shall be split between the parties, with each party having the responsibility of paying one-half of any uncovered medical or dental costs.

10. That each party is awarded his or her own personal property already in their possession.

11. Plaintiff is awarded the following items of property:

a. His federal retirement, free of any claim of the defendant	\$ 29,000.00
b. Furniture, sporting equipment and personal effects in plaintiff's poss.	1,000.00
c. 1986 Volkswagon automobile	6,800.00
d. Ketchum bank account	300.00
e. Hoback property	45,000.00
f. Plaintiff's IRA	11,952.00
TOTAL	\$ 94,052.00

12. Defendant is awarded the following items of property:

a. Riverdale home located at 3985 South 700 West, subject to mortgage thereon	\$ 29,000.00
b. Furniture and household contents in defendant's possession	6,500.00
c. 1981 Honda automobile	2,000.00
d. Defendant's IRA	2,576.00

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e. Weber Valley Bank savings	1,600.00
f. Moore Financial stock	648.00
g. Victor Estates	4,500.00

TOTAL	<u>\$ 46,824.00</u>
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13. In order to equalize the above property distribution, plaintiff shall pay to defendant:

(a) the sum of \$12,000.00 cash, the same to be paid within ninety (90) days, or on or before January 21, 1988.

(b) an additional sum of \$12,000.00 in order to compensate her for plaintiff's IRA, the same to be paid within two (2) weeks of the entry of this Decree of Divorce.

14. The assets of Phillips Investments Trust are plaintiff's sole and separate property and defendant has no claim thereon.

15. Defendant is entitled to all antiques which were given to her by her family, free and clear of any claim by plaintiff.

16. Defendant shall pay the mortgage on the Riverdale home to Fleet Mortgage and hold plaintiff harmless thereon, together with any other debts or obligations she may have in her own name.

17. Plaintiff shall pay the Sears bill in the

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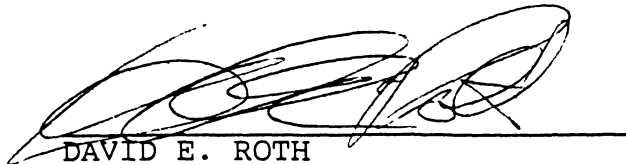
approximate amount of \$335.00, the debt owing to Rose Bourgeois in the amount of \$600.00, together with any other debts or obligations he may have in his own name and hold defendant harmless thereon.

18. Plaintiff shall pay to defendant's attorney, Robert L. Neeley, the sum of \$1,000.00 as partial payment of defendant's attorney fees.

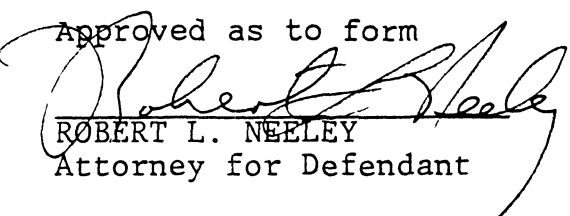
19. That each of the parties shall execute and deliver to the other party any deeds, stock certificates, insurance policies, assignments, and any other documents or instruments as may be necessary to release the claim of the other in their respective real and personal properties as now held in the possession of each of the parties. Each party has entered his or her appearance before this Court and this Court hereby assumes continuing jurisdiction and authority to enter such Orders as may be necessary or appropriate to accomplish the purposes of this paragraph.

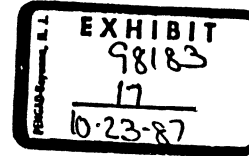
DATED this 18 day of November, 1987.

BY THE COURT:


DAVID E. ROTH
District Court Judge

Approved as to form


ROBERT L. NEELEY
Attorney for Defendant



JOINDER OF SPOUSE

KATHY A. PHILLIPS, the wife of SCOTT H. PHILLIPS, hereby states and acknowledges that the partnership interest in PHILLIPS INVESTMENTS owned by her husband, Scott H. Phillips, was entirely derived from the receipt of property distributed to her husband from the liquidation of Phillips Investment Co., the stock of which was acquired by her husband prior to their marriage or by gift during their marriage and therefore, is his sole and separate property in which she claims no interest, community or otherwise; and it is further agreed that all income and gain from such separate property shall be the sole and separate property of said husband.

KATHY A. PHILLIPS further states and acknowledges that she has read the foregoing General Partnership Agreement and understands the provisions thereof and in consideration of the execution of said Agreement by the Partners, hereby agrees to be fully bound and controlled by the terms of said Agreement; and, further, that upon the death of her husband she shall execute any and all documents necessary to carry out the terms and provisions of this Agreement and/or to accomplish the transfer of all stock owned by her husband to the surviving Partner, pursuant to the terms of said Agreement.

DATED: This 12th day of May, 1983.

Kathy A. Phillips
Kathy A. Phillips

STATE OF UTAH)
County of Weber) ss

On this 12th day of May, 1983, before me, the undersigned, a Notary Public in and for said State, personally appeared KATHY PHILLIPS, known by me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Signature]
Notary Public in and for the State of
Utah, Residing at Orderville

Exhibit E

At Tr. p.22, lines 8-12, Frances Phillips states that she and her husband gifted money to her two sons (Scott and Mark) each year.

And that money from the gift that we gave to the boys was used to pay the premiums on the--those life insurance policies.

At Tr. p.32, lines 24 & 25 and p.33, lines 1-12, Frances Phillips testified that Phillips Investments had an insurance account and that Scott had been able to use that in order to acquire his brother Mark's interest.

Q. Now, Scott didn't have to give up anything personally because fortunately there was this insurance policy?

A. That's why it had been set up that way.
Tr. p.33, lines 10-12.

At Tr. p.40, lines 7-13, Mr. Hugh Phillips testified that he and his wife had given yearly gifts to their sons so they could pay the insurance premiums.

Q. Were you also in addition to the shares of stock, giving your sons cash in order to pay premiums on life insurance policies?

A. Mrs. Phillips and I, from our personal checking account, our personal assets, we made a gift to our two sons every year so they could pay for the premiums of life insurance on Mrs. Phillips, on Mark and on Scott.

At Tr. p.46, lines 23-35 and p.47, lines 1-3, Mr. Hugh Phillips verifies that Scott Phillips never put any of his personal assets into Phillips Investments.

Q. Do you ever recall at any time, either while it was Phillips Investment Corporation or all the way up to now with it being Phillips Investment Trust, Scott Phillips taking any assets that he had acquired through his employment and putting it into Phillips Investment?

A. No, he did not.

No exception was made to that statement to state that Scott somehow had used his own funds to purchase the insurance premiums.

At Tr. p.69, lines 20-25, and p.70, lines 1-6, Scott Phillips also testified that the insurance premiums were paid from monies that were gifted to him and his brother by his parents. Scott was discussing the fact that he had received \$12,000.00 from the Phillips Investment funds and had used it as a down payment on a family home (that payment thus became part of the marital estate). Scott explained that he had had to ask his brother Mark for the money and that Mark was the one who determined whether or not there was any such money to use.

A. (Scott Phillips' testimony)... Mark said, Scott, there is some left over money here from the gifting program from our parents after the insurance premiums were paid that would be available to you.

At Tr. p.140, lines 20-23, Mrs. Kathy Phillips also verifies that she and her husband did not put any money into Phillips Investments.

Q. And you and Scott never took your own property or things that you bought from his Forest Service salary and put it into Phillips Investment, did you?

A. No.

Certainly there was no testimony from Kathy Phillips that Scott had been paying insurance premiums out of their marital property.